91-1539 (1)

NO.

Supreme Court, U.S.
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THE UNITED STATES SUPREME COURT

HELEN & ROBERT WIECH

Petitioners

v.

FAIRFAX COUNTY DHD

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

Distilled to its essence, this case involves a confrontation between the best interests of the child standard and the fundamental liberty interest of family autonomy under the First and Fourteenth Amendments. The confrontation is particularized into the following issues:

1. Whether natural parents of a profoundly handicapped child are denied due process under the Fourteenth Amendment by having their parental rights terminated because they do not get along with third party providers who must necessarily be involved with the handicapped child when the only third party provider with whom the parents do not get along with is the State?

2. Whether natural parents of a profoundly handicapped child are denied equal protection under the Fourteenth Amendment when their parental rights are terminated because of an alleged inability to get along with third party providers of the handicapped child when natural parents of a non—handicapped child must be found to be unfit in their parenting skills before their parental rights can be terminated?

3. Whether a natural father's parental rights to a profoundly handicapped child can be terminated on a theory of vicarious liability wherein the natural father is held accountable for the acts of his wife, the child's natural mother?

4. Whether Va. Code § 16.1-283 is constitutionally vague?

PARTIES TO THIS PROCEEDING AND CORPORATE AFFILIATIONS

The parties are the same as in the courts below, Helen and Robert Wiech and the Fairfax County, Virginia Department of Human Development. The Guardian ad-litem for the child, Helen Leiner, Esquire, has notified Petitioners that she will not participate in this proceeding.

The parties have no corporate affiliations.

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THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

No.

HELEN & ROBERT WIECH, Petitioners

v.

FAIRFAX COUNTY DHD

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

TO THE HONORABLE CHIEF JUSTICE
AND ASSOCIATE JUSTICES

Helen and Robert Wiech, petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered on January 2, 1992.

OPINIONS BELOW

The unreported Order of the Supreme Court of Virginia denying Petitioners' Petition For Appeal is Appendix A, infra.

The opinion of the Court of Appeals of Virginia, Appendix B, infra was reported as Helen W. and Robert W. v. Fairfax County Department of Human Development, 12 Va. App. 877, 407 S.E. 2d 25 (Va. App. 1991).

The unreported Order of the Circuit Court of Fairfax County terminating parental rights is Appendix C, infra.

JURISDICTIONAL STATEMENT

The Order appealed from was issued by the Supreme Court of Virginia on January 2, 1992. The jurisdiction of this Court is grounded on 28 U.S.C.A. § 1257 (a) (Cum. Supp. 1991).

CONSTITUTIONAL PROVISIONS AND STATUTES

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Va. Code § 16.1-283

The residual parental rights of a parent or parents of a child placed in foster care as a result of court commitment . . . may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child and that:

* * * *

2. The parent or parents, without good cause, have been unwilling or unable within a reasonable period not to exceed twelve months to remedy substantially the conditions which led to the child's foster care placement, notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end.

STATEMENT OF THE CASE

Prior Proceedings

Helen and Robert Wiech ("Helen," "Robert," collectively "Wiechs") appeal the Order of the Supreme Court of Virginia, issued January 2, 1992, affirming the orders of the Court of Appeals of Virginia issued July 1, 1991 and the Circuit Court of Fairfax County, Virginia, terminating the Wiechs parental rights in their daughter, Sarah Wiech ("Sarah"). Appendices A-C.

Throughout the court proceedings, including the trial level, the Wiechs have raised the federal constitutional issues which form the predicate for this appeal. At the trial level the Wiechs filed a Memorandum explicating the federal constitutional issues involved. The Wiechs in their Briefs to the Virginia Court of Appeals and the Supreme Court of Virginia argued that the termination of their parental rights violated the United States Constitution. See Appendix B, the reported decision of the Virginia Court of Appeals.

Framing of Issue

Sarah is a profoundly handicapped child. Now 17 years old, she has the mental capability of a 2 year old and has many physical and emotional handicaps including, inter alia, cleft lip, a substantial loss of hearing, and a history of abusing her self physically.

Dr. Gregory Straw, a psychiatrist who testified as an expert witness for the respondent, crystallized the fundamental

issue involved in this case; viz., it is not the Wiechs' inability to parent Sarah which compels the termination of their parental rights, but their, or specifically Helen's inability, to get along with third party providers who, Dr. Straw claims, must necessarily be involved with a profoundly handicapped child like Sarah. Straw's testimony, Trans., Vol. I, p. 38, 5-10, App. 32, Wiechs have "no difficulty" taking care of Sarah, Id. p. 43, 6-10, App. 37; Sarah responds warmly to Wiechs as parents, Id., p. 43, 6-10, App., 37; Sarah "clearly responded to parents," Id., p. 58, 4-6, App. 52; Sarah enjoyed interacting with Helen, Id. and p. 51, 20-23, App. 45, no indications that Helen could not parent Sarah; Helen's interaction with child "no means a reason to remove the child from the home."

According to Dr. Straw, the Wiechs' case poses "a very difficult problem," Trans., Vol. I, p. 52, 1, App. 46, for the traditional nuclear family is incapable of caring for a child with Sarah's infirmities. Trans., Vol. I, p. 61, App. 55. Dr. Straw and DHD would solve the problem with state intervention; by removing children like Sarah from their natural parents and terminating their parental rights.

In fact, the issue is even more fundamental than Dr. Straw believes. The one third party provider whom the Wiechs seemingly cannot get along with is the State in the person of the Fairfax County Department of Social Services ("DSS").[1] Prior to the involvement of the State, for approximately 12 years, the Wiechs

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[1] DSS is now the Fairfax County Department of Human Development ("DHD"). In this Petition, "DHD" will be used to designate the Department of Social Services and the Department of Human Development.

cared for their daughter and interacted with third party providers. See Trans., Vol. II, pp. 102-04, for example, for a list of medical doctors and hospitals which have treated Sarah while she was in the Wiechs' custody. Both Helen and Robert testified that they never had a problem with third party providers prior to the State's intervention.

In its most fundamental terms, this case presents a confrontation between the United States Constitution and the best interest of the child standard for, as indicated by Dr. Straw, the Wiechs are not unfit parents, but Sarah must be protected from possible harm from her parents because of her multiple handicaps.

Factual Background

For the first 12 years of her life Sarah lived with the Wiechs who provided for all of her needs. During this time the Wiechs took Sarah to every medical facility between Washington, D.C. and Charlottesville, Virginia and even to California and Texas to obtain the best possible medical advice about their child's care and treatment. Robert testified that the Wiechs have spent between $80,000.00 and $90,000.00 on medical treatment for Sarah. Trans., Vol. I, p. 227, 3-7, p. 228-29.[2]

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[2] The trial transcript is divided into two volumes each beginning with page 1. Volume I is the testimony of September 28, 1989; Volume II is the testimony of September 29, 1989.

Due to the Wiechs' impecuniousness the portions of the trial testimony cited herein could not be included in the Appendix.

In May, 1983, Sarah and her brother Christopher Wiech were removed from the family home by DHD for not attending school. Both children were returned to the Wiechs in October, 1983.

The immediate progenitor of this case was the removal of both Wiech children in May, 1986. The Wiechs and their children had gone to Virginia Beach to look for housing and schooling in anticipation of Robert's transfer to the Tidewater area by his employer. The family spent several days in Virginia Beach over the Memorial Day holiday so that the children missed a day of school. When the family returned to Northern Virginia both children were again removed from the home by DHD. Christopher, now age 13, was returned to the Wiechs In October, 1986. Sarah, however, has remained in foster care to the present day.

During the time that Sarah has been in foster care there have been many disputes between the Wiechs and DHD over Sarah's education and medical treatment. These disputes are the predicate for DHD's claim that the Wiechs have not made reasonable efforts under Va. Code § 16.1-283 to remedy the conditions which required the taking of the child.

Specifically DHD claims that the Wiechs refused to cooperate in Sarah's education at Kilmer School and therefore have hindered the child's development. Further, DHD argues that the Wiechs have opposed medical care for Sarah. According to DHD, the Wiechs have also have engaged in harmful activities such as Helen taking Sarah to Johns Hopkins University Medical School in Baltimore without the permission of DHD and Helen and

Sarah's foster mother physically fighting with each other in Sarah's presence.

In all of these activities DHD has imposed a form of vicarious responsibility on Robert, holding him responsible for Helen's acts even though the trial testimony revealed that in many instances Robert either did not know in advance what Helen was going to do or tried to moderate the situation when he was drawn into the events. See, for example the testimony of Raymond Bryant, the principal of Kilmer School, that Robert has generally been cooperative. Trans., Vol. I, p. 139, 20-21; testimony of Florence Hannigan, social worker, that Robert had coaxed Helen into calming down during a confrontation between Helen and Sarah's foster mother. Trans. Vol. I, p. 192-193, App. 183-84.

Lastly, DHD claims that Helen is either a borderline personality or paranoid and that as a result she cannot effectively interact with third party providers selected by the State, who, according to DHD, must be involved in caring for a child as profoundly handicapped as Sarah. Dr. Straw testified that he suspects that Helen is a borderline personality. Trans. Vol. I, p. 44, 12-16, App. 38. The vicarious responsibility imposed by DHD on Robert makes him liable for Helen's emotional and/or mental deficiencies if she has such deficiencies.

REASONS FOR GRANTING WRIT

I

THE TERMINATION OF THE WIECHS' PARENTAL RIGHTS VIOLATED THEIR FUNDAMENTAL LIBERTY INTEREST IN FAMILY INTEGRITY

The relationship between natural parents and their child is constitutionally protected. Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923). This Court characterized a "parent's right to the companionship, care, custody, and management" of his/her child as "far more precious ... than property rights." May v. Anderson, 345 U.S. 528, 533 (1952).

This Court has also held that "freedom of choice in matters of family life is a fundamental liberty interest" protected by the United States Constitution through the Fourteenth Amendment. Santosky v. Kramer, 455 U.S. 745, 753 (1982); Smith v. Organization of Foster Families, 431 U.S. 816 (1977). One of the liberties included within this freedom of choice in family matters is the right of a parent and child to maintain, mold, and cultivate their ongoing relationship. Stanley, supra.; Quilloin v. Walcott, 434 U.S. 246 (1978). This inherent right of family integrity is not even diminished when the nuclear family has been fractured by divorce. Id.

The Court has stressed that the constitutional protection granted the family is based on the "emotional attachments" that derive from the intimacy of daily association. Such intimate "emotional attachments" are necessarily reciprocal, in which each

of the participants has a linked, but plainly separate, interest. Smith, supra. at 844. The right to family integrity is an "important interest of both parent and child," Stanley, supra. at 657; for "minors, as well as adults, are protected by the constitution and possess constitutional rights." Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1956). See also In Re Gault, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.")

This fundamental liberty interest of family integrity cannot be infringed absent a compelling governmental interest, and even then, the State must utilize the least restrictive means to accomplish its objective. Stanley, supra.; Dunn v. Blumstein, 405 U.S. 330, 343 (1972). In Smith, supra., Justice Stewart described the parameters of the State's power to intrude in the parent-child relationship:

> One of the liberties protected by the due process clause ... is the freedom to 'establish a home and bring up children....' If a State were to attempt to force the breakup of a natural family over the objections of their parents and their children without some showing of unfitness and the sole reason to do so was thought to be the child's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the State cannot enter'. 431 U.S. at 862-63.

Justice Stewart was reiterating an established constitutional principal extending back to Pierce v. Society of Sisters, 268 U.S. 510 (1925) that although the State has a legitimate interest in protecting minor children, that interest is circumscribed by the federally protected rights of the natural parents, and that interest is not furthered by separating children from their natural parents except in egregious circumstances. Justice Stewart was also clear

that if there is a conflict between the best interests standard, a mere rule of evidence, and the United States Constitution, the best interests standard is subservient to the Constitution.[3]

The fundamental liberty interest of family integrity "does not evaporate simply because [parents] have not been model parents or have lost temporary custody of the child to the State." Santosky v. Kramer, above, at 753. Thus, parents and child have a constitutionally protected liberty interest to maintain their ongoing relationship through visitation. See Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983) (U.S. Marshals' Service liable for money damages for interfering with visitation rights); Ruffalo v. Civiletti, 539 F. Supp. 949, 952 (W.D. Mo. 1982) ("visitation rights are entitled to due process protection [substantive and procedural"]). Even prisoners legitimately incarcerated have a right to visit with their children. Mabra v. Schmidt, 356 F. Supp. 620 (W.D.Wis. 1973).

In this case the Wiechs' constitutional right to the "care, custody and companionship" of Sarah has been brushed aside by (1) failing to use the least restrictive means possible; (2) imposing on Robert vicarious liability for Helen's acts; and (3)failing to show that Helen or Robert are unfit parents.

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[3] U. S. Const., art. VI, cl. 2 states "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Least Restrictive Means Not Used

DHD has not used the least restrictive means. For example, the Agency never inquired into the possibility of other family members who would be willing to take the custody of Sarah on a temporary or permanent basis. Helen testified without contradiction that "never" during the long history of this case had any social worker inquired about or attempted to place Sarah with other family members. Trans., Vol. II, p. 137, 15-18. Yet, federal law mandates that least restrictive means be used. Permanent foster care is a last resort.

Less restrictive means would have been to place Sarah with a family member or allowing Sarah to remain in the Wiechs' custody with appropriate monitoring procedures in place to insure that Sarah was being properly cared for. Dr Straw seemingly was aware of means less restrictive than termination when he asked Robert to submit a plan detailing how the family would interact with third party providers of Sarah in the future. Robert provided such a plan albeit 7 days late due to the death of his mother and problems at his place of employment. Trans., Vol I, pp. 68-9, App. 63. See App. 531 for Robert's "plan". Dr. Straw admitted that the plan was logical and that Robert had done "specifically what I had asked him to do." Trans., Vol. I, p. 75, 1-3. App. 69. Yet DHD and Dr. Straw summarily and arbitrarily rejected the plan without affording Robert an opportunity to put the plan into practice even on a temporary basis so that empirical evidence could be gathered about the viability of the plan.

Another example of DHD's cavalier disregard for the federal mandate of less restrictive means is the failure of the Agency to give the Wiechs reasonable visitation with their daughter. The Wiechs have not had a visitation with Sarah since August, 1988. Testimony of Florence Hannigan, social worker, Trans., Vol. I, p. 196, 13-23, App. 187. Mrs. Hannigan's transparent excuse for no visitation was that she could not "insure Sarah's safety." Trans., Vol. I, p. 209. Later Mrs. Hannigan testified that neither Robert or Helen had ever attacked Sarah. Id., p. 196-97, App. 187-88. The real reason for the denial of visitation emerged when Mrs. Hannigan testified that in August, 1988 she had already decided that the Wiechs' parental rights should be terminated so she decided to forego further visitation. Id.

Visitation with one's child is subsumed within the fundamental liberty interest of parental autonomy, see Franz, Ruffalo, and Mabra, supra. Before a fundamental liberty interest can be abridged a predeprivation hearing is required. Daniels v. Williams, 474 U.S. 327, 338-39 (1986) Stevens, J., concurring). No pre— or postdeprivation hearing was afforded the Wiechs. Instead they were denied visitation by administrative fiat. The effect of the denial of visitation was to further fracture the natural bond between Sarah and her parents and provide an impetus to the adoption of Sarah by an approved parent; a parent compatible with the ultimate third party provider, DHD, and a parent who apparently is free of the alleged mental and/or emotional deficiencies which might plague Helen. Note Dr. Straw's testimony above that he saw nothing to suggest that Helen cannot be an effective parent for Sarah.

This Court has cautioned against the type of denial of procedural due process which is seen here. In Santosky, above, the Court said:

> Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting State intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. 455 U.S. at 753-54.

By eliminating the Wiechs' visitation with Sarah, DHD enhanced its preconceived conception that natural parents cannot cope with the vicissitudes of caring for a profoundly handicapped child, a task best left to the State. Instead of trying to implement its legally binding mandate to reunite families, DHD moved in the opposite direction and in August, 1988 decided to permanently sever the familial bond between the Wiechs and their daughter.

No Showing of unfitness

As Justice Stewart stated in Smith, supra, before the State can separate parents from their children there must be a showing of parental unfitness. DHD has not shown the unfitness of either of the Wiechs. Indeed, DHD's expert, Dr Straw, was clear that Robert is a fit parent. Trans., Vol. I, p. 69, 13-20, App. 63. Dr. Straw in addition to testifying about Helen's apparent ability to parent Sarah, see supra, also testified as follows, Trans. Vol. I, p. 71, App. 65:

Q. [DIJOSEPH] If you will -- isn't it true that based on your observations the Wiechs, both Robert and Helen, pose no danger to Sarah Wiech?

A. [STRAW] That is not true.

Q. [DIJOSEPH] The danger that they pose is that they cannot deal with third party providers?

A [STRAW] That is the only [emphasis added] danger that I saw that was at all consistent.

Under Virginia law, a specific factual finding of unfitness is not necessary in parental termination proceedings. Once a Virginia Court decides that termination is proper, then unfitness is presumed. Harris v. Lynchburg Division of Social Services, 223 Va. 235, 241, 288 S.E. 2d 410, 413 (1982).

However, Dr. Straw, the State's expert impugns the unfitness finding. According to Straw, both Wiechs can effectively parent Sarah. The only danger is that Helen has a problem dealing with third party providers and Dr. Straw even admitted that his opinion re third party providers and Helen was not a firm opinion, but merely a prediction. When DHD's case is stripped of its prolixity, the Wiechs' parental rights were terminated because Helen has problems dealing with the State in the persona of DHD and its third party providers. Robert, according to Dr. Straw, "was supporting his wife as best he could in taking care of Sarah," and Robert was "attempting to deal with the realities of dealing with his wife and all those third party carriers that Sarah needed." Trans., Vol. I, p. 46, 1-6, App. 40.

The State apparently believes that the fundamental liberty interest discussed above is subservient to the best interest standard.

In this case, because of Sarah's multiple handicaps, her best interest demands that she be protected from her natural parents even though according to the State's expert the natural parents can effectively parent Sarah. The State's position is contra to the well settled precedents of this Court cited above.

II.

ROBERT'S AND HELEN'S RIGHT TO EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT HAS BEEN VIOLATED

This case also involves issues of equal protection. Robert and Helen are being treated differently than other parents in Virginia because they are the parents of a profoundly handicapped child. As a result, Robert's and Helen's parental rights have been terminated because Helen cannot get along with third party providers. See Dr. Straw's testimony above. An administrative class of citizens has been established, parents of profoundly handicapped children, whose parental rights are at risk not because they cannot effectively parent their child, but because the child's multiple handicaps require assistance from groups outside of the nuclear family. In Helen's case, in addition, DSS has created a subclass of parents who have mental and emotional impairment and who have profoundly handicapped children.

Using the de facto administrative classification of DHD, parents in Virginia are divided into two classes: (1) parents of "normal" children; (2) parents of handicapped children. In the first class, parental rights can be terminated on a showing of abuse and neglect, or other unfitness related to parenting. In the second class, failure to interact with third party providers selected by the State can be grounds for termination, particularly if a parent has a mental or emotional impairment.

Interestingly, Helen and Robert have a proven track record in parenting a child in DHD's first class comprised of so-called "normal" children. Christopher Wiech is now 13 years old, maintains an "A" average in school, is active in Boy Scouts, baby-sits for neighborhood children, and plays soccer and baseball. In Robert's words Christopher is "a standard kid." Trans., Vol. I, p. 241, 10-15, p. 242, 10-15. The Wiechs have had no problems in dealing with third party providers for Christopher although since he is "normal" there are less third party providers to contend with then there would be with Sarah. The invidiousness of DHD's classification is apparent. Christopher also missed a day of school in May, 1986. He, like Sarah, was removed from the home, but he was returned to the Wiechs in October, 1986. The implication that can be drawn from Christopher's return is that DHD considers that the Wiechs can parent Christopher, but they cannot "parent" Sarah, profoundly handicapped, because her care requires third party providers.

Because fundamental liberty interests are involved, see above, strict scrutiny must be applied to DHD's de facto classification of parents. Zablocki v. Redhail, 434 U.S. 374, 388 (1978) and cases cited above. In order to survive the strict scrutiny test a classification must support a compelling state interest and must be "closely tailored to effectuate only those interests." Id. The state undoubtedly has an interest in protecting minor children. However, the protection of the profoundly handicapped child is served by the same state interest in protecting so-called "normal" children; the state cannot abridge the parents' interest in the care, custody, and companionship of their child unless the child is in imminent danger of irreparable injury. That the interests of the

profoundly handicapped child and the "normal" child are essentially the same can be drawn from Va. Code § 16.1-251, 252, 253 which make no distinction between "normal" and handicapped children. Foster care harms all children,[4] particularly the profoundly handicapped child like Sarah. The administrative classification, then, does not further a compelling state interest beyond the interest of protecting all minor children.

Nor is the administrative classification carefully tailored. The classification is a shotgun approach which in fact penalizes those parents who do not produce "normal" offspring by making parental rights dependent on the ability to interact with third party providers selected by bureaucrats.

If greater state intervention in the families of profoundly handicapped children is justified, the state has less restrictive means at its disposal than termination of parental rights. For

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[4] "Uninterrupted home life 'comports with each child's biological and psychological need for unthreatened and unbroken continuity of care by his parents. No other animal is for so long a time after birth in so helpless a state that its survival depends upon continuous nurture by an adult. Although breaking or weakening the ties to the responsible and responsive adults may have different consequences for children of different ages, there is little doubt that such breaches to the familial bond may be detrimental to a child's well being." [Footnotes omitted]. Goldstein, Medical Care For The Child At Risk: On State Supervision of Parental Autonomy, 865 Yale L. J. 645, 649 (1977).

See also Wald, Thinking About Public Policy Toward Abuse And Neglect of Children, 78 Mich. L.R. 645, 662 (1980). "Even when placed in a good environment, which is often not the case, they [children] suffer anxiety and depression from being separated from their parents, they are forced to deal with new caretakers, playmates, school teachers, etc. As a result they often suffer emotional damage and their development is delayed."

example, the State could require periodic reports by all third party providers selected by the parents, thus monitoring the child's progress. Of course, the State also has at its disposal the laws prohibiting abuse and neglect which apply to all parents.

The Wiechs' right to equal protection was also denied for financial reasons. The Wiechs have been forced to subject themselves to many mental health professionals, including Drs. Aswani, Seghal, Corbel, Bettis, Palombi, and Straw. Trans., Vol. I, p. 250, 1-4. Except for Dr. Straw, the Wiechs have had to bear the financial burden of these experts at a cost, in most cases, of $170.00 per hour. Id., 15-19. In Robert's words, "I cannot do that [pay the experts]. It is beyond my capabilities. We have tried to see them as long as we had the ability to pay them, and you pay them up front, the check is at the counter when you leave" Id. Thus, there are two classes of parents. Those with the financial resources to meet the financial requirements imposed by the State and those, like the Wiechs, who lack the financial wherewithal to do so.

III.

ROBERT'S RIGHTS UNDER THE FOURTEENTH AMENDMENT WERE VIOLATED WHEN HE WAS HELD VICARIOUSLY LIABLE FOR HELEN'S ACTIONS

Robert's federally protected rights to parental autonomy and due process under the Fourteenth Amendment have been violated by making him vicariously responsible for Helen's acts. Faced with Dr. Straw's testimony that Robert is a fit parent, DHD tried to merge Helen and Robert into one person and thereby impose on Robert the responsibility for Helen's difficulties with Sarah's foster mother and the other incidents involving Helen and DHD. For DHD, Helen is a puppeteer and Robert her puppet who can be manipulated to do Helen's will. Therefore, Robert shares the responsibility for Helen's activities, for the strings which bind a puppeteer to her puppet make their actions one.

The doctrine of "vicarious parental responsibility"[5] cannot be supported by legal authority. The law of Virginia not only does not recognize the concept but Va. Code § 16.1-283 expressly recognizes the individuality of each parent, "The Court may terminate the residual parental rights of one parent without affecting the rights of the other parent.' Va. Code § 16.1-283 is consistent with other sections of the Virginia Code. Under Va. Code § 55-36 married women can sue and be sued "in the same manner and with the same consequences as if she were unmarried." Married women can also enter into contracts as if

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[5] The term is a creation of the Wiechs' counsel.

unmarried. Moreland v. Moreland, 108 Va. 93, 60 S.E. 730 (1908).

It is elementary that the rights guaranteed by the Federal Constitution were designed to protect the individual from over-reaching government power. For example, the Fourteenth Amendment expressly recognizes that constitutional protection shields the individual from government:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

To strip Robert of his constitutional right to parental autonomy because of the actions of Helen is similar to forcing a husband to testify because a wife has waived her right to self incrimination. Helen and Robert are two different individuals. In Helen's words, ". . . [I]t's so glaringly obvious that my husband and I are two different people, and that probably is the strength of a marriage and the balance of any good relationship." Trans., Vol. II, p. 172, 4-7. Helen continued with a common sense observation which has eluded DHD, "Actually to be honest, you know, I don't think it's any secret that husbands and wives have discussions and disagreements." Trans., Vol. II, p. 173, 11-14. Helen and Robert each has certain rights guaranteed by the federal Constitution. Each must be judged separately when those rights are implicated as in this case.

DHD and the Virginia courts never faced the issue of Robert's interaction with third party providers. His involvement in the series of incidents that have plagued Helen's relationship with DHD has been peripheral. Yet his constitutional rights have been made to be parasitical to Helen's rights. He has been held responsible for Helen's acts to the extent that his fundamental liberty interest have been truncated, against the settled precedents this Court has enunciated over many years.

IV.

VIRGINIA CODE § 16.1-283 IS CONSTITUTIONALLY VAGUE

Va. Code § 16.1-283(C) provides in pertinent part:

> The residual parental rights of a parent or parents of a child placed in foster care as a result of court commitment . . . may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child and that:
>
> * * * *
>
> 2. The parent or parents, without good cause, have been unwilling or unable within a reasonable period not to exceed twelve months to remedy substantially the conditions which led to the child's foster care placement, notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end.

A non-criminal statute is constitutionally vague and therefore violative of the due process provisions of the Fourteenth Amendment when: (1) the language of the statute does not give a fair warning of what is prohibited, Connally v. General Construction Co., 269 U.S. 385, 391 (1926); (2) the statute gives unbridled discretion to executive department officials which promotes subjective and arbitrary decisions; (3) the statute unduly inhibits the exercise of a constitutional right. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). Fair warning means that persons of average intelligence "must necessarily guess as to its

[statute's] meaning and differ as to its application." Connally, supra.

Va. Code § 16.1-283 fails all three tests. The statute does not give fair warning. The statute is couched in terms of the ambiguous "best interests" standard which can mean anything to anybody. Nor does the statute define "good cause". In this case the Wiechs' problems with the State concerned Sarah's educational program and her medical problems. In the education area, the Wiechs were advised by a recognized expert in the field that Sarah's educational plan violated federal law. Yet, DHD and the Virginia courts decided that reliance on an expert is not "good cause" within the statute. In the medical area, DHD and the Virginia courts also rejected the Wiechs' contention that reliance on the advice of Dr. Coleman, the preeminent medical expert in the country in the care and treatment of handicapped children identical to Sarah, was "good cause". Dr. Coleman advised the Wiechs to oppose the State's plan for Sarah's emotional and social development. What then is "good cause"? Neither the Wiechs or any other parents faced with termination can read the statute and know beforehand what "good cause" is so they can avoid termination.

"Reasonable progress" towards the elimination of the conditions which precipitated foster care is similarly vague. Again a parent cannot read the statute and know beforehand what is required. Robert was asked by Dr. Straw to present a plan to resolve the problem of third party providers. Dr. Straw admitted that the plan was logical and that Robert had done "specifically what I had asked him to do." Trans., Vol. I, p. 75, 1-3. App. 68-

69; See Mr. Wiech's plan titled "Memorandum," App. 531. Yet, DHD claims that this was not "reasonable progress".

The statute's ambiguity fosters the unbridled discretion of DHD's officials which is the second lodestar of constitutional vagueness. Since a parent "of reasonable intelligence must necessarily guess" as to what "best interest" and "good cause," and "reasonable progress" mean, it is left to DHD's caseworkers to give their subjective and arbitrary values to those terms. The Wiechs simply had no way to review the statute beforehand and arrive at objective standards which would insure that their parental rights could not be terminated. They were left at the mercy of DHD which had made the decision in August, 1988 to remove the Wiechs from their child's life. The exercise of unbridled discretion is vividly illustrated by Robert's reaction to Dr. Straw's request for a plan for dealing with third party providers, set forth above. Robert's "failure" to satisfy Dr. Straw was used to terminate his parental rights. The statute allowed a cherished constitutional right, the right to family integrity, to be subject to the whim of a private citizen albeit a mental health professional under special contract to the State.

Lastly, the statute inhibits the exercise of constitutional rights. The Wiechs were forced to subject themselves to numerous mental health professionals whose findings were used against the Wiechs in court. Their constitutional right to privacy in family matters was brushed aside. The Wiechs' right to visit with their child at a crucial time was similarly arbitrarily abridged. Their right to family integrity has been destroyed.

For Helen, the statute's constitutional vagueness is particularly harmful. Presumably, the prime condition which led to Sarah's placement in foster care is that Helen is a borderline personality, a character defect which cannot be "cured". If Helen reads the statute how is she to know wnat she is to do to save her parental rights?

The flawed constitutional analysis of the Virginia Court of Appeals, adopted by the Virginia Supreme Court, is evident in its opinion upholding termination of parental rights, "Moreover, in the case before us, numerous court orders were entered by the trial court during the pendency of Sarah's placement in foster care which directed the parents to take specific actions necessary for Sarah's care." Helen W And Robert W. v. Fairfax County DHD, 12 Va. App. 877, 883, 407 S.E.2d 25 (1991). The void for vagueness doctrine raison d' etre is to allow affected parties to know before they are involved in the judicial system, before they are under a court order, how to avoid a statute's prohibitions.

SUMMARY AND CONCLUSION

The termination of the Wiechs' parental rights violated the provisions of the Fourteenth Amendment. This case gives the Court an opportunity to decide the relationship between the best interests of the child standard, the fundamental liberty interest of parental autonomy, and the Fourteenth Amendment. A Petition For Certiorari should be issued to the Virginia Supreme Court.

HELEN & ROBERT WIECH

By Counsel

SATTLER & DiJOSEPH

By _____
JOHN M. DiJOSEPH
AND

_____
WILLIAM E. BEETON
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I mailed postage prepaid 3 copies of the foregoing Petition For Writ of Certiorari to Ann Gouldin, Esquire, Assistant County Attorney, Office of the County Attorney, The Massey Building, 4100 Chain Bridge Road, 10th floor, Fairfax, Virginia 22030, this 26th day of March, 1992

_____
JOHN M. DiJOSEPH

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VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON
Thursday the 2nd day of January, 1992

Helen Wiech, et al., Appellants,

against Record No. 911177
Court of Appeals No. 0221-90-4

Fairfax County, D.H.D. Appellee

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal on the merits.

Justice Keenan took no part in the consideration of this case.

A Copy,
Teste:
David B. Beach, Clerk

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Alexandria

HELEN AND ROBERT W.

v.

FAIRFAX COUNTY DEPARTMENT OF HUMAN DEVELOPMENT

No. 0221-90-4

Decided July 1, 1991

SUMMARY

Parents appealed the decision of the circuit court terminating their parental rights. They argued that the termination proceedings violated their constitutional rights to equal protection and due process, that the trial judge erred in finding that they did not make reasonable efforts to remedy the conditions which led to the foster care placement, erred in denying their discovery motion, erred in denying their motion for a jury trial, and erred in refusing to recuse himself. The father also argued that the trial court erred in holding him responsible for the actions of the mother (Circuit Court of Fairfax County, Lewis H. Griffith, Judge).

The Court of Appeals affirmed, holding that the evidence supported the finding that termination was in the best interests of the child. The Court also held that the other issues lacked merit.

Affirmed.

HEADNOTES

(1) **Domestic Relations—Termination of Parental Rights—Standard.**—The termination of residual parental rights is a grave, drastic and irreversible action; consequently, while it may be occasionally necessary to sever the legal relationship between parent and child, those circumstances are rare.

(2) **Constitutional Law—Due Process—Void for Vagueness.**—A statute is not void for vagueness when it contains clear and specific guidelines for its application in particular cases.

(3) **Domestic Relations—Termination of Parental Rights—Standard.**—Code § 16.1-283, by its very nature, contemplates the use, where possible, of alternatives less drastic than termination of parental rights.

(4) **Domestic Relations—Termination of Parental Rights—Standard.**—Once a trial court has determined that the factors listed in Code § 16.1-283(C) exist, this finding is tantamount to a finding of parental unfitness and no separate finding of unfitness is necessary.

(5) **Domestic Relations—Due Process of Law—Standard.**—Code § 16.1-283(C)(2) does not require parental visitation in every case where a social service agency assumes responsibility for the foster care of a child.

(6) **Domestic Relations—Termination of Parental Rights—Discovery.**—The granting or denying of a discovery request is a matter within the trial court's discretion and will be reversed only if the action taken was improvident and affected substantial rights.

(7) **Courts—Judicial Bias—Standard.**—The fact that a trial judge is familiar with the parties and their legal difficulties through prior judicial proceedings is not sufficient to establish bias.

COUNSEL

John M. DiJoseph (Sattler & DiJoseph, on briefs), for appellant.

Ann Gouldin, Assistant County Attorney; Helen Leiner (David T. Stitt, County Attorney; Robert Lyndon Howell, Deputy County Attorney, on brief), for appellee.

OPINION

KEENAN, J.—Helen W. (mother) and Robert W. (father) appeal the trial court's order terminating their residual parental rights to their daughter, Sarah, and granting custody of Sarah to the Fairfax County Department of Human Development (Department). The parents raise five issues on appeal: (1) whether the termination order violated their fourteenth amendment rights to

both substantive and procedural due process and equal protection; (2) whether the trial court erred in finding that they did not make reasonable efforts to remedy the conditions which led to the placement of Sarah in foster care; (3) whether the trial court erred in denying their motion for discovery; (4) whether the trial judge erred in denying their motion that he recuse himself; and (5) whether the trial court erred in denying their motion for a jury trial. In addition, the father argues that the trial court erred by terminating his parental rights, because in so doing, the trial court held him responsible for the actions of his wife. We find that the trial court did not err in its decision that termination of both parents' residual parental rights was in the best interests of Sarah. We further find no merit in the parents' procedural arguments. Accordingly, we affirm the decision of the trial court.

Sarah W. is a seventeen year old multiply handicapped child. She suffers from severe retardation and hearing loss, possessing the functional skills of a two year old child. She has a number of physical disabilities, including a cleft palate, congenital heart disease, visual atrophy in one eye, microcephalas and retarded growth rate. Prior to her placement in foster care, Sarah engaged in self-abusive behavior, was not toilet trained, and was unable to communicate or get around unassisted.

The Department first became involved with the family in November 1983. Prior to May 1986, the juvenile court ordered that Sarah attend the Kilmer Center School, which has a special education program for severely mentally retarded and multiply handicapped students. Sarah attended the school on May 7 and 8, 1986 and May 20, 21 and 22, 1986. The Department obtained an emergency removal order and took custody of Sarah on May 28, 1986, after being apprised by the school of Sarah's absences.

Once Sarah was placed in foster care, the parents were offered weekly supervised visitation with her, and by August 1986, unsupervised day visits were taking place. When the initial unsupervised overnight visit was successful, a second overnight visit was scheduled. The parents did not return Sarah at the appointed time, but instead kept her for a consultation with a physician in Virginia Beach regarding cleft palate surgery. Several days later, Sarah's child protective services worker (worker) received a call from a Virginia Beach physician. The physician reported that the parents were seeking to have Sarah hospitalized for scratches and

abrasions, but stated that he did not believe that hospitalization was required. Although the worker instructed the parents to return Sarah to the Department, she received a second call from the father later that day indicating that Sarah was being admitted to Fairfax Hospital.

Sarah was released from Fairfax Hospital on September 4, 1986. Instead of returning Sarah to the Department, the mother took Sarah back to Virginia Beach, where she was again admitted to the hospital. Sarah's worker then contacted the father and asked him to bring Sarah back. When he refused, Sarah's worker went to pick her up from the hospital. Sarah had abrasions on her face. In addition, the skin on her face and legs was raw and bleeding, and she was very agitated. The mother called the police in an attempt to prevent the worker from taking Sarah from the hospital. Overnight visitations were discontinued at this time and replaced with supervised visitation at the Department. Neither parent attended many of the scheduled visitations.

In November 1986, Sarah was diagnosed as having a cholesteatoma in her ear. The parents were opposed to surgery, so a CAT scan was performed which confirmed the need for surgery. Surgery was then scheduled for February 3, 1987. On that day, the parents objected to the surgery being performed, stating that they wanted it done at a different hospital. The surgery was rescheduled for April 13, 1987. The Department obtained court ordered consent to the surgery after Sarah's physician explained that her condition was life threatening. On April 10, 1987, the parents filed a suit in federal court to block the surgery and called the physician, stating that they were opposed to her performing the surgery. Sarah's physician then cancelled the procedure. Sarah finally underwent surgery in July 1987, pursuant to a court order.

Sarah's worker scheduled an unsupervised day visit with the parents in July 1987 prior to her undergoing surgery. The mother did not return Sarah at the scheduled time. Sarah was finally located by the police at the parents' home late that evening. Both parents were present in the home, but neither had notified the Department as to Sarah's whereabouts. In August 1987, during a supervised visit at the Department, the mother took Sarah from the Department and went over to the juvenile court when Sarah's worker left them alone for several minutes. The worker had not

given her permission to leave with Sarah.

Visitation was sporadic after this and the mother was often agitated and abusive towards Sarah's worker during the visitation. On one occasion, in February 1988, she wrapped herself around Sarah and screamed that Sarah was being abused. When the father was notified by Sarah's worker that visitations could not continue in this manner, he told the worker that she was trying to break the family apart. Thereafter, Sarah's worker refused visitation unless the father was present. The next visit did not occur until July 1988 and both parents attended. Two subsequent family visits went well.

A third family visit, in August 1988, had to be ended when the mother became agitated and upset. She was verbally abusive to Sarah's worker and foster mother. The following day, Sarah was visibly upset, engaged in self-abusive behavior and had to leave school early. All visitation between the parents and Sarah was terminated at this time.

Both parents were instructed by the foster care services plan and the court order to undergo mental health evaluations and treatment. Cathy Pumphrey, an expert clinical psychologist who evaluated them, diagnosed the mother as suffering from paranoid schizophrenia. She concluded that the mother's ability to parent Sarah was significantly impaired because she was unable to trust anyone and operated under a paranoid delusional system. Pumphrey diagnosed the father as suffering from paranoid personality. She concluded that the parents' paranoid system was well entrenched and that both parents were incapable of parenting Sarah.

The parents saw two different therapists between October 1986 and June 1987. In November 1987, the Department offered the parents the opportunity to participate in a psychiatric evaluation with Dr. Straw, with the understanding that Sarah would be returned home if Dr. Straw concluded that Sarah could be safely returned. Although the parents met with Dr. Straw twice, he was unable to finish his evaluation because the mother refused to meet with him alone.

The parents met with Dr. Straw again in December 1988, after the juvenile court continued the Department's termination pro-

ceeding to enable the parents to complete the evaluation and undergo therapy. Dr. Straw asked the father to present a plan that would ensure that Sarah would receive assistance from third party providers, since this was critical to Sarah's safety and well-being. This plan was not presented until the case came back before the juvenile court for review. As a result, Dr. Straw concluded that Sarah could not be safely returned home because the plan did not adequately address his concerns as to third party providers, was not timely presented, and suggested a course of conduct which he believed would only exacerbate the parents' long history of problems in dealing with third party providers.

The juvenile court terminated both parents' residual parental rights on May 11, 1989 and approved the foster care service plan documenting a program goal of adoption. A trial *de novo* was held in circuit court on September 27, 1989. Prior to the trial, the parents filed a discovery request and a plea in equity, demanding a jury trial. Both motions were denied. At the hearing, they also requested that the trial judge recuse himself, due to his earlier involvement in the foster care placement, medical treatment and school issues. This motion was also denied. The circuit court terminated both parents' residual parental rights pursuant to Code § 16.1-283(C) by order entered January 30, 1990 and approved the foster care service plan recommending a program goal of adoption. This appeal followed.

Initially, the parents argue that the termination order violated their fourteenth amendment rights to the "care, custody and companionship" of their daughter because the trial court failed to consider less drastic alternatives, there was no showing that either parent was unfit, and they were not put on notice of what was required to prevent termination of their rights. Further, they claim that their visitation was improperly terminated without an opportunity to be heard, in violation of their due process rights.

The Department responds that ample evidence was presented supporting the trial court's finding that termination was in Sarah's best interests and that the conditions of Code § 16.1-283(C) had been met. Moreover, the Department maintains that once these conditions are met, a further showing of unfitness is not required. Finally, the Department maintains that the parents knew what was required of them by the Department and the court, and it was their own refusal to utilize the services provided to properly care

for Sarah which led to the termination of both visitation and residual parental rights.

(1) "The termination of [residual] parental rights is a grave, drastic and irreversible action." *Lowe v. Department of Public Welfare of the City of Richmond*, 231 Va. 277, 280, 343 S.E.2d 70, 72 (1986). Consequently, "[w]hile it may be occasionally necessary to sever the legal relationship between parent and child, those circumstances are rare." *Weaver v. Roanoke Department of Human Resources*, 220 Va. 921, 926, 265 S.E.2d 692, 695 (1980). Code § 16.1-283 provides the framework in which the trial court can terminate parental rights. In the case before us, the parents' rights were terminated pursuant to Code § 16.1-283(C). That section provides in pertinent part:

> The residual parental rights of a parent or parents of a child placed in foster care as a result of court commitment . . . may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child and that:
>
> * * *
>
> 2. The parent or parents, without good cause, have been unwilling or unable within a reasonable period not to exceed twelve months to remedy substantially the conditions which led to the child's foster care placement, notwithstanding the reasonable and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end.

(2) Initially, we reject the parents' argument that Code § 16.1-283 is void for vagueness, since the statute contains "clear and specific guidelines for its application in particular cases." *Knox v. Lynchburg Division of Social Services*, 223 Va. 213, 223, 288 S.E.2d 399, 404 (1982). Moreover, in the case before us, numerous court orders were entered by the trial court during the pendency of Sarah's placement in foster care which directed the parents to take specific actions necessary for Sarah's care. The Department also filed foster care service plans outlining the steps which the parents had to take before Sarah could be returned home. Finally, as early as the spring of 1988, Sarah's worker told the father that the case was headed toward termination if the difficulties in the parents' visitation with Sarah were not resolved.

Based on this record, we find unpersuasive the parents' claim that they did not have fair warning of what was required to retain custody of Sarah.

We also reject the parents' claim that the termination order deprived them of a fundamental liberty interest in the "care, custody and companionship" of Sarah, in violation of their fourteenth amendment rights. The parents claim that less drastic alternatives were available to the state, including the placement of Sarah with other family members or relatives, or Sarah's continued custody with the parents, subject to appropriate monitoring procedures.

(3) Code § 16.1-283, by its very nature, "contemplates the use, where possible, of alternatives less drastic than termination of parental rights." *Edwards v. County of Arlington*, 5 Va. App. 294, 312, 361 S.E.2d 644, 654 (1987)(quoting *Knox*, 223 Va. at 223, 288 S.E.2d at 404). In the case before us, no evidence was presented that the alternatives suggested by the parents were available. First, the record does not demonstrate that other family members or relatives were able and willing to care for Sarah. In addition, the parents' long history of conflict with both the Department and other third party providers belies their claim that appropriate monitoring procedures could be utilized, enabling them to retain custody of Sarah.

The record shows that supervised visitation, when it occurred, was fraught with conflict between the mother and Sarah's workers. The father either would not participate or, when he did, was unable to alleviate the conflict. Furthermore, after the visits, Sarah was agitated and upset. When allowed unsupervised visitation, the parents repeatedly violated the conditions placed on the visitation and frequently removed Sarah to unknown locations. During one of these episodes, Sarah inflicted serious injuries to herself, which took more than a month to heal.

In addition, the parents refused to participate in recommended mental health treatment, in spite of requirements in the foster care service plan and court orders that they do so. Cathy Pumphrey, a clinical psychologist who evaluated the parents, diagnosed them as suffering from paranoid delusions. She concluded that the parents shared a paranoid system that was well entrenched, that their prognosis was poor and that as a result, they were incapable of parenting Sarah. Further, the record at trial

discloses that the parents repeatedly refused to cooperate with third party providers regarding Sarah's educational program and medical needs and that they were unable to accept Sarah's handicaps and limitations. Dr. Straw, a psychiatrist, advised the trial court that the parents' continued inability to work with third party providers made it unsafe for Sarah to return to their care, since third party care was critical for her safety and well-being.

(4) Based on this record, we find that the trial court did not err in concluding that the parents were unable or unwilling to remedy the conditions which led to Sarah's placement in foster care, and that continued custody in the parents was not in Sarah's best interests. Consequently, continued custody in the parents was inconsistent with the purposes of Code § 16.1-283 and was not an alternative to the termination of parental rights. Furthermore, once the trial court determined that the factors listed in Code § 16.1-283(C)(2) existed, this became tantamount to a finding of parental unfitness and no separate finding of unfitness was necessary. *See Harris v. Lynchburg Division of Social Services*, 223 Va. 235, 241, 288 S.E.2d 410, 413 (1982). Since no evidence was presented that less drastic measures were available to the trial court, and the statutory requirements for termination of parental rights were met, we find that the trial court's order terminating the parents' residual parental rights did not violate their fourteenth amendment due process rights.

(5) In addition, we find that the Department's decision to terminate visitation in August 1988 did not violate the parents' procedural due process rights. Code § 16.1-283(C)(2) does not require parental visitation in every case where a social service agency assumes responsibility for the foster care of a child. "The question must be resolved . . . in light of the facts of each case, with the best interests of the child as the guiding principle." *Toombs v. Lynchburg Division of Social Services*, 223 Va. 225, 230, 288 S.E.2d 405, 407 (1982). In the case before us, continued attempts were made by the Department to allow both parents supervised and unsupervised visitation for a period exceeding two years. The visitations were marked by conflict and were often detrimental to Sarah. The Department advised the father in early spring 1988 that this pattern could not continue. Visitation was finally ended in August, 1988 when, after an extremely difficult session, the mother screamed into an audio trainer used by Sarah to enhance

her hearing. Three months later, the juvenile court continued the prohibition on the parents' visitation until Dr. Straw could finish his evaluation. Based on this record, we find that the Department's restriction on visitation promoted Sarah's best interests and was validated by court order after a hearing. Consequently, no procedural due process violation occurred.

We also find no merit in the parents' argument that the termination order violated their equal protection rights. In determining that termination was warranted under Code § 16.1-283, the trial court is bound to consider the best interests of the child. Sarah is a multiply handicapped child. As a result, special needs must be met in order to serve her best interests. Dr. Straw advised the court that because of Sarah's physical and mental handicaps, the family is incapable of providing all of her care. Thus, he concluded that the ability of the parents to work with third party providers was "critical" to Sarah's safety and well-being in the home. He also concluded to a reasonable degree of psychiatric certainty that the parents were unable to work with third party providers to address Sarah's needs.

We reject the parents' contention that the trial court's order deprived them of equal protection based on the fact that they were the parents of a handicapped child. The trial court found that the parents' continued inability to work with third party providers directly affected Sarah's safety and well-being. Because of Sarah's handicap, this was a crucial step in determining whether continued custody with the parents was in Sarah's best interest. Furthermore, the trial court found that the parents had refused medical treatment to correct a life-threatening condition and resisted efforts to develop an appropriate educational program for Sarah. The court concluded that the Department had proved by clear and convincing evidence that termination of parental rights was in Sarah's best interest. Moreover, the Department presented clear and convincing evidence that the parents had refused to remedy the conditions which led to Sarah's placement in foster care pursuant to Code § 16.1-283(C)(2). These findings are amply supported by the evidence.

Based on this record, we find that the trial court did not apply a different standard in making its decision to terminate the parental rights of Robert and Helen W. due to the fact that they were the parents of a handicapped child. The parents were afforded the

same protections as any parents facing a termination procedure, and were not deprived of their fourteenth amendment guarantee of equal protection.

The parents also argue that the trial court erred in finding that the termination of parental rights was appropriate under Code § 16.1-283(C) because they demonstrated good cause for failing to remedy the conditions which led to Sarah's placement in foster care. They claim that their unwillingness to allow Sarah to undergo aural surgery and their refusal to cooperate with the Kilmer Center were based on expert medical and legal advice, which they were entitled to follow. We disagree.

Although the parents sought expert advice regarding Sarah's medical treatment and education, they were still subject to court order to have Sarah attend the Kilmer Center School and have the cholesteatoma surgically removed. Thus, if the parents possessed information that this course of action was not beneficial to Sarah, their remedy was to have the trial court modify its orders or challenge the orders on appeal, not simply ignore them and follow their own course of action. We find that the mere fact that the parents' experts disagreed with the trial court's orders does not constitute sufficient good cause to excuse the parents' failure to remedy the conditions which led to Sarah's placement in foster care. Further, no evidence in the record establishes that the parents advised either the Department or the court that they were financially unable to participate in the programs and services required as part of the foster care services plan.

(6) The parents argue that the trial court erred by denying their request for the production of documents and interrogatories on DSS. "The granting or denying of a [discovery request] is a matter within the trial court's discretion and will be reversed only if the action taken was improvident and affected substantial rights." *Rakes v. Fulcher*, 210 Va. 542, 546, 172 S.E.2d 751, 755 (1970). Assuming without deciding that the parents were entitled to discovery, the record does not support a finding that the parents suffered any prejudice from the denial of their discovery motion.

Further, we find no merit in the parents' claim that they were entitled to a jury trial pursuant to Code § 8.01-336(D). The parents claim there were no facts supporting termination and thus, their plea reduced the proceedings to a single issue. The advan-

tage of a defense by plea is that it shortens the litigation by reducing the issue to a single point. *Campbell v. Johnson*, 203 Va. 43, 47, 122 S.E.2d 907, 909 (1961). Unlike an answer, a plea in bar presents a distinct issue of fact. *Id.* The parents' plea did not limit the litigation to a single point but rather was the crux of the proceedings. Consequently, we find that it was not the type of action governed by Code § 8.01-336(D).

(7) In addition, we find that the trial court's denial of the parents' motion to recuse was not an abuse of discretion. The fact that the trial judge is familiar with the parties and their legal difficulties through prior judicial proceedings is not sufficient to establish bias. *Deahl v. Winchester Department of Social Services*, 224 Va. 664, 672, 299 S.E.2d 863, 867 (1983). No evidence in the record establishes that the trial judge possessed such bias or prejudice as a result of his prior involvement in this case as to deny the parents a fair trial.

Finally, we reject the father's claim that his rights were improperly terminated because the court imposed vicarious liability on him for the actions of his wife. The record is replete with examples of the father's failure to remedy the conditions which led to Sarah's placement in foster care. He repeatedly refused to cooperate with school officials, Sarah's workers, and mental health professionals. Further, he made only minimal efforts to comply with the foster care services plan, and acted with the mother in blocking Sarah's surgery and school participation.

Cathy Pumphrey concluded that, although the father's personality disorder was not of a psychotic nature, as was the mother's, that the paranoid system they shared made both parents incapable of parenting Sarah. Dr. Straw indicated that the family system compromised the father's abilities to meet Sarah's needs and that he was unable to devise a plan to remedy the parents' difficulties with third party providers. Based on this record, we find that the trial court did not err in finding that clear and convincing evidence supported the termination of the father's residual parental rights under Code § 16.1-283(C).

For the reasons stated, we affirm the order of the trial court terminating the residual parental rights of Helen W. and Robert W.

Affirmed.

Koontz, C.J., and Benton, J., concurred.

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VIRGINIA:

IN THE CIRCUIT COURT
OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	
	)	JUV. NO. 2877
HELEN and ROBERT WIECH,	)	
Defendants.	)	
	)	
IN RE: SARAH WIECH.	)	
	)	

ORDER

THIS MATTER CAME ON BEFORE this Honorable Court on the 27th and 28th days of September, 1989, for a trial de nova on the merits of a petition filed by the Fairfax County Department of Human Development (hereinafter "the Department") alleging that termination of parental rights is in the best interests of Sara Wiech pursuant to Va. Code § 16.1-282, as amended; and

IT APPEARING TO THE COURT that Robert and Helen Wiech, parents, personally appeared and were represented by their counsel, John M. DiJoseph, esquire; and

IT FURTHER APPEARING TO THE COURT that the Department has established by clear and convincing evidence that:

1. Robert and Helen Wiech, without good cause, have been unwilling or unable within a reasonable period not to exceed twelve months, to remedy substantially the condition which led to the child's foster care placement, notwithstanding the reasonable

and appropriate efforts of social, medical, mental health or other rehabilitative agencies to such end; and

2. IT FURTHER APPEARING TO THE COURT that the Court's letter opinion dated November 2, 1989 is incorporated herein by reference; and

IT FURTHER APPEARING TO THE COURT that entry of the following order is necessary to protect the welfare of Sarah Wiech,

UPON CONSIDERATION THEREOF it is hereby ADJUDGED, ORDERED and DECREED that

1. The parental rights of Robert and Helen Wiech are hereby terminated pursuant to Va. Code § 16.1-283.

2. Legal custody of Serah Wiech is hereby continued with the Department.

3. The foster care service plan filed herein pursuant to Va. Code § 16.1-282, documenting adoption as the goal of the plan, is hereby approved as submitted.

4. The Department shall have the authority to place for adoption and consent thereto.

AND THIS ORDER IS FINAL.

ENTERED this 30th day of January, 1990.

Lewis Hall Griffith
JUDGE